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IN THE

Supreme Court of the United States

October Term, 1963

No. 596

PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY, WASHINGTON,
Petitioner,

v.

MERRITT-CHAPMAN & SCOTT CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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Three principal suggestions emerge from the Brief for Respondent in Opposition. Respondent suggests that:

1. The Court of Appeals "was required to decide a question of New York law without the guidance of decisions by New York's highest court", and that this Court should therefore give special weight to the Court of Appeals' expert status as to the laws of states within its circuit (Brief in Opposition, pp. 6-13); that

2. The precedent established by the Court of Appeals is unimportant because it is not of general application (*id.* pp. 16-18); and that

3. It is the responsibility of the New York Legislature to undo any mischief that may have been wrought by the decision of the Court of Appeals (*id.* p. 19).

There is no merit in any of these suggestions.

I

In suggesting that the Court of Appeals was required to act "without the guidance of decisions by New York's highest court" (Brief in Opposition, pp. 6-7), respondent overlooks two salient considerations:

First, the doctrine that an attachment may not be levied upon property "exempt from levy or sale by virtue of an execution" is set forth in Section 912 of the New York Civil Practice Act, and requires no judicial interpretation (Petition, pp. 3, 8).

Second, such exemption from levy—in the absence of an express statute—for property of a state instrumentality devoted to public use was established by New York's highest court in 1877 (*Leonard* v. *City of Brooklyn*, 71 N. Y. 498) and has never been challenged in that state (Petition, pp. 8, 10-11). Indeed, as noted in the excerpt from Dean Fordham's treatise cited at page 8 of the Petition, it is an almost universal American doctrine that "property of a unit of local government presently devoted to a public use and appropriate to that end is free from execution."

Respondent quotes from the Special Term's opinion in *Doyle v. City of Astoria, Ore.*, to the effect it had not there been established "that the attachment levied by the plaintiff prevented the municipality from continuing to function" (Brief in Opposition, p. 9). The quotation is out of context, its use misleading. In that case, the defendant municipality had separately contended that the funds in question were exempt from attachment because (a) they were trust funds, and (b) they were held by the municipality in its governmental—rather than proprietary—capacity. It appears from the opinion that the validity of the trust theory was in part dependent upon a showing that the municipality was unable to replace with other moneys the funds that had been attached in New York.[1] Thus, in proper context, the Special Term observed (147 Misc. at 128, 262 N. Y. Supp. at 573):

> "The affidavits submitted fall short, however, of establishing any trust. Though forwarded to the Chase Bank 'to pay City of Astoria, Oregon Water Bonds,' the money must nevertheless be treated as part of the free funds of the municipality, held in its corporate capacity, and subject to its control. There is no evidence that the debt limit had been exceeded and that further taxation would be impossible, nor any proof that the attachment levied by the plaintiff prevented the municipality from continuing to function."

The Special Term then went on to consider the wholly separate question whether the city had established that the funds attached were "devoted to a governmental purpose, and as such exempt from attachment" (147 Misc. at 128-

1. See also Papers on Appeal to Appellate Division, "Action No. 1" and "Action No. 2", at p. 12; fols. 35-36 (two separate actions on, so far as here relevant, identical papers were involved in the *Doyle* case).

129, 262 N. Y. Supp. at 573). Concluding that governmental purpose had not been established, the Special Term denied the motion to vacate the attachment. The briefs on appeal to the Appellate Division disclose that the trust argument was there abandoned (see Respondent *Doyle's* Brief, p. 11), and that the appeal turned on the question whether or not the moneys attached were "public funds" (see Appellant *City's* Point II, pp. 5-9; Respondent *Doyle's* Point I, pp. 3-10). Neither side, on that appeal, made any reference to the question whether the attachment "prevented the municipality from continuing to function", or to the Special Term's observation in that regard.

Not one of the decisions discussed at pages 8 to 10 of the Brief in Opposition lends support to the thought that New York courts would countenance an examination of the necessity in each case as a condition of exemption from attachment of governmental property devoted to public use.[2] On the contrary, two of them (*Doyle* and *Harman*) expressly make the attachability of a foreign municipality's property depend on a finding that such property is held "in its private or proprietary capacity" (*Doyle*, 147 Misc. at 128, 262 N. Y. Supp. at 573; *Harman*, 134 Misc. at 135, 234 N. Y. Supp. at 198; see also CARMODY-WAIT as quoted at p. 9 of Petition). The third case (*Van Horn*) discussed by respondent quotes with approval a categorical declaration that it is "the settled doctrine of the law" that the "public property" of municipal corporations "cannot be seized un-

2. It is perhaps significant that respondent's counsel in the case at bar did not—before the Court of Appeals developed and formulated its novel theory—argue that a foreign municipality was required to establish specific interference with function as a condition of exemption from attachment of its governmental property devoted to public use (see opinions below, 207 F. Supp. 443 *passim*, Petition, pp. 1a-12a; 319 F. 2d at 113, Petition, pp. 51a, 53a).

der an execution against them" (28 Misc. at 335, 59 N. Y. Supp. at 884). When the case reached the Appellate Division, that court—by affirming on opinion below—unanimously approved this declaration of the settled doctrine of the law concerning municipal corporations' public property (46 App. Div. 623, 61 N. Y. Supp. 1150).[3]

Those cases (*Doyle*, *Harman* and *Van Horn*) all deal with foreign municipal corporations. There is, therefore, no basis for respondent's suggestion (Brief in Opposition, p. 11) that New York would withhold from "a *foreign* municipal corporation" judicial protection which it regularly affords its own municipalities. Any such suggestion would —even in the absence of such authorities—be unthinkable where, as here, there is involved the instrumentality of a state whose relevant public policy is substantially identical with New York's (see Brief *Amicus Curiae* of the Attorney General of the State of New York, p. 3).

II

The suggestion that the Court of Appeals' decision constitutes a narrow holding without precedential value (Brief in Opposition, pp. 16-18) is hardly consistent with that court's avowed purpose to "formulate in precise terms" the controlling "rule of policy of the State of New York" (319 F. 2d at 103, Petition, p. 31a), or with its prediction that "the rule formulated by us this day

3. As noted in the Petition (pp. 5-6), both courts below found the funds here involved to constitute governmental property devoted to public use. See, *e.g.*, the portion of the Court of Appeals' opinion headed "UNDER NEW YORK LAW THE ACTIVITIES OF THE DISTRICT [PETITIONER] WERE GOVERNMENTAL AND NOT PROPRIETARY" (319 F. 2d at 104-109, Petition, pp. 33a-43a).

* * * rests on a solid foundation and will endure" (319 F. 2d at 113; Petition, p. 52a).

There is little merit in the contention (Brief in Opposition, pp. 17-18) that NEW YORK BUSINESS CORPORATION LAW §1314(b) minimizes the impact of the Court of Appeals' decision. That section—successor to GENERAL CORPORATION LAW §225—does not restrict actions brought in New York by residents or by domestic corporations who are assignees of foreign corporations. *McCauley* v. *Georgia Railroad Bank* (1924) 239 N. Y. 514, 147 N. E. 175. Thus, BUSINESS CORPORATION LAW §1314(b) would not bar suit by any New York resident or domestic corporation as assignee of respondent's cause of action. *Wagner* v. *Braunsberg* (1st Dept. 1958) 5 A. D. 2d 564, 566, 173 N. Y. Supp. 2d 525, 529.

Respondent also refers to New York CPLR §302 (Brief in Opposition, p. 17). That section deals only with *in personam* jurisdiction.[4] It does not affect the use that can be made of attachment as a means of obtaining *quasi-in-rem* jurisdiction over foreign defendants. Its existence in no way diminishes the urgent necessity of correcting the Court of Appeals' decision, which—in a way in conflict with applicable state law—unduly extends, over the governmental instrumentalities of other states, the *quasi-in-rem* jurisdiction of United States district courts sitting in New York.

4 Generally accepted principles of comity as between states would prevent assertion of *in personam* jurisdiction over instrumentalities of sister states in litigation arising out of their governmental activities (see Brief *Amicus Curiae* of the Attorney General of the State of New York, pp. 3, 7, 9-11; Petition, p. 18 n. 6). Assertion of *in personam* jurisdiction over a state instrumentality exclusively engaged in governmental activity, and created pursuant to a statute consenting to suit only in a forum of the home state, would also give rise to a serious question under the Full Faith and Credit Clause (CONSTITUTION OF THE UNITED STATES, ART. IV, SEC. 1).

III

Perhaps the most startling aspect of respondent's argument is the suggestion that it is the responsibility of the New York Legislature to repair any mischief that the Court of Appeals may have wrought; and that the Attorney General of the State of New York should—instead, perhaps, of laying his views before this Court pursuant to Rule 42(4) of the Supreme Court Rules—look to the Legislature for corrective legislation (Brief in Opposition, p. 19).

If there were merit in such a suggestion, Rule 19.1(b) of the Supreme Court Rules would be meaningless. In any case where a court of appeals has decided "an important state or territorial question in a way in conflict with applicable state or territorial law", the state or territorial legislature can, if it wishes, remedy the mischief by corrective legislation. However, to the many and varied burdens which rest upon the legislatures of the several states and territories there should not, we submit, be added the burden of rectifying decisions of the United States courts of appeals.

In conclusion, we take brief note of respondent's repeated attempts—successful in the court below (see Petition, p. 15, n. 5)—to inject into this jurisdictional issue questionable allegations concerning the merits. For example, in the footnote to page 15 of its brief, respondent asserts: "The acceptance of the work as completed by the District's [petitioner's] engineers is binding upon the Dis-

trict [petitioner]." Respondent supports this proposition with a Washington Supreme Court 1914 decision. However, a 1915 amendment of the pertinent statute provides that a public body cannot be bound except by its own affirmative action in accepting the contractor's work as completed. *National Blower & Sheet Metal Co.* v. *American Surety Co.* (1952) 41 Wash. 2d 260, 264, 248 P. 2d 547, 549. In the instant case, petitioner has refused to accept the so-called certificate tendered by the engineer, and has refused to accept respondent's work as completed (see *Affidavit of Myles C. McGough in Support of Plaintiff's Application for a Warrant of Attachment*, Joint Appendix, p. 33a; Petitioner's RESOLUTION No. 952, *id.* pp. 58a-63a). The validity of petitioner's position in so refusing will be a principal issue in this lawsuit, wherever it comes to trial (see Petition, p. 5, and n. 2).

There is not in this case—and never has been—any question whether petitioner may "insulate itself from the payment of its just debts" (compare Brief in Opposition, pp. 12-13). The Washington State Legislature has specifically provided that petitioner "may be sued in the county in which it is located" (Petition, p. 66a).

Nor is there merit in respondent's suggestion (Brief in Opposition, pp. 15-16) that the petition is premature. The question here presented—a question which must be answered at this time if petitioner is to get the protection of the correct rule of law (*cf.* Petition, p. 21)—is whether petitioner may be compelled, contrary to applicable New York law, to satisfy a court in New York of its particular need for the $47,000,000 respondent has attached, in order to

avoid having to defend this lawsuit in a forum not designated by the Washington State Legislature.

Respectfully submitted,

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